IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8438 OF 2006

Shri Krishankumar Karsandas Ashar
Age : 65 years, Occ.Business
R/o.: Welcome House, Tukaram
Mahadik Road, Jambali Naka,
Thane-400 601 **... Petitioner (Orig.Defendant)**

Versus

1.Municipal Corporation of the City of Thane
having it's office at
Municipal Corporation Building
Netaji Shubhachandra Bose Road,
Thane 400 601.
Through it's Commissioner

2.The Municipal School Board of Thane having it's office at Thane Municipal Corporation building, Netaji Shubhshchandra Bose Road, Thane 400 601.
Through the administrative officer **...Respondents (Orig.Plaintiffs)**

Mr.Anil Singh with Mr.Sandesh Patil for the Petitioner
Mr.R.S. Apte for the Respondents

CORAM : S.R.SATHE,J.
DATED : 08/08/2007

ORAL JUDGEMENT :-

1. The Petitioner-original defendant in Special Civil Suit No.505 of 1986 has filed this Writ Petition to challenge the order passed by the Joint District Judge, Thane in Civil Appeal No.11 of 2002 whereby the said Court held that it has no jurisdiction to entertain the said appeal (filed by the present petitioner) and directed that appeal memo be returned

to the appellants.

2. The brief facts giving rise to this Writ Petition are as under :-

Suit Property admeasuring 1950 sq.ft. situated at Tika No.2, CTS No.320, Gokhale Road, Thane was owned by one Sultan Ali Thanawala. The Thane Municipal Corporation-original Plaintiff in Special Civil Suit No.505 of 1986 was in occupation of the suit premises as monthly tenant at monthly rent of Rs.122.12 ps. The Thane Municipal Corporation was using the said premises for their municipal school No.3. The present petitioner purchased the said property from Thanawala in the year 1980-81 for the purpose of demolishing the old structure and erecting thereon new building to provide alternate accommodation to the existing tenant. Accordingly, the Petitioner issued letters dated 30/10/1982 and 30/11/1982 to Plaintiff-Corporation and also forwarded duly typed stamp paper agreeing therein to provide in the new building, portion admeasuring 1950 sq.ft. to Thane Municipal Corporation for the purpose of school. Thane Municipal Corporation accepted the said proposal. However, subsequently, on 15/12/1982 Petitioner wrote a letter to Municipal School Board (original Plaintiff No.2) and asked them to give loan

of Rs.5 lakhs and rent at the market rate. According to Thane Municipal Corporation the said demand was obviously beyond the scope of original agreement.

3. When some portion of the new building was constructed and ready for occupation, Thane Municipal Corporation asked the Petitioner to hand over the possession of the same. With a view to occupy the new premises, it was decided to surrender the possession of old tenements and accordingly, Plaintiff No.2 passed resolution and issued letter dated 09/05/1985 regarding the surrender of possession of the old tenements. However, subsequently, realizing attitude of the Petitioner even the said resolution was also cancelled. As the Petitioner did not provide new tenements, Thane Municipal Corporation-original Plaintiff No.1 issued letter dated 04/07/1985 to the defendant and called upon him to act upon the agreement. The Petitioner gave reply to the said notice and denied to give the new accommodation. He, on the contrary, contended that new premises were not ready and the possession of the old premises has been surrendered and as such, Plaintiff-Thane Municipal Corporation has relinquished its rights. According to Thane Municipal Corporation-original Plaintiff, they had never surrendered tenancy

rights and it was only for the sake convenience, Plaintiff No.2 had agreed to surrender the possession of the old premises, so that, there should not be any difficulty in allotting new premises.

4. According to Thane Municipal Corporation and the School Board i.e Plaintiff Nos. 1 and 2, the Petitioner committed breach of the agreement whereby he had agreed to give area equal to old premises in the new building. Hence, Thane Municipal Corporation and the School board filed Special Civil Suit No.505 of 1986 in the Court of Civil Judge Senior Division, Thane for declaration that the agreement made by the Petitioner vide letter dated 30/10/1982 and 30/11/1982 is valid subsisting and binding on the parties thereto and also sought the declaration that Thane Municipal Corporation has not surrendered or relinquished their leasehold rights or tenancy rights in respect of the old premises. The original Plaintiff also prayed that the Petitioner be directed to specifically perform the agreements dated 30/10/1982 and 30/11/1982 and hand over the new tenements alongwith necessary documents. In the alternative Thane Municipal Corporation also submitted that in case it is held that original Plaintiffs are not entitled for specific performance of

the suit agreements then Petitioner-original defendant be directed to pay Thane Municipal Corporation Rs.40 lakhs together with interest at the rate of Rs.18%. Plaintiff valued the suit at Rs.40 lakhs and accordingly, paid necessary Court Fee Stamp.

5. The present Petitioner filed his Written Statement Exh-20 and opposed the suit filed by Thane Municipal Corporation. He admitted that in the old building some portion was in occupation of Thane Municipal Corporation as monthly tenant. He, however, contended that Thane Municipal Corporation relinquished its tenancy rights and issued necessary letter to that effect. He further contended that as a result of the said letter he created third party interest in respect of the newly constructed building and as such, suit for specific performance is not maintainable. According to him, Plaintiff had no right to claim damages of Rs.40 lakhs as alleged and they were also not entitled to get declaration and injunction as prayed for. Hence, on all these grounds the present petitioner-original defendant prayed for the dismissal of the suit.

6. On these pleadings, learned Joint Civil Judge Senior Division Thane framed issues at Exh-33. After

considering the oral and documentary evidence adduced by both the parties, learned Trial Judge came to the conclusion that Plaintiff-Thane Municipal Corporation had never surrendered its tenancy rights and Plaintiff-Thane Municipal Corporation is entitled for specific performance of the agreement. He, therefore, held that the agreement executed by Petitioner to provide alternate accommodation in the new building is valid and subsisting and Plaintiffs are still tenant in respect of the suit premises and decreed the suit for specific performance in favour of Plaintiff and directed the defendant-present petitioner to give accommodation as agreed in the new building.

7. Being aggrieved by the above mentioned order the present petitioner filed Civil Appeal No.11/2002 in the District Court Thane. He valued the said appeal for Rs.40 lakhs and paid necessary court fee stamp accordingly.

8. When the said appeal came before the Joint District Judge, Thane, he held that as per the provisions of Bombay Civil Courts Act pecuniary jurisdiction of District Court Thane to entertain appeals from judgement of Civil Court is limited to

Rs.2 lakhs and as such the said Court has no jurisdiction to entertain the said appeal and therefore, directed that appeal memo be returned to the appellant.

9. The petitioner challenged the above mentioned order passed by the Joint District Judge Thane in this Court by filing A.O. No.378 of 2004 when the said A.O. was placed before the Court (CORAM : D.G. KARNIK,J.) preliminary objection about the maintainability of the appeal was raised and the advocate for the present Petitioner sought leave to withdraw the appeal with liberty to challenge the impugned order before the appropriate forum in appropriate proceeding subject to law of limitation. So, A.O. was dismissed with liberty accordingly.

10. After the withdrawal of the above mentioned A.O. the original defendant has filed the present Writ Petition. In this Writ Petition before me, Shri Anil Singh, learned Advocate for the Petitioner submitted that the suit which was filed by Thane Municipal Corporation was basically a suit under the Rent Act. Even the Trial Court also proceeded by treating the said suit as suit under the Rent Act and therefore,

gave a declaration that Plaintiffs are still tenants in respect of the suit premises in the new building. So, according to him, District Judge Thane had jurisdiction to try the said appeal. According to the learned advocate an argument to that effect was also advanced before the Joint District Judge but he wrongly held that the said Court has no jurisdiction to try the said appeal. He, therefore, submitted that the Writ Petition be allowed, the order passed by the Joint District Judge, Thane be set aside and the matter be remanded to the said Court with a direction to consider the argument of the original defendant that as per the provisions of the Rent Act the said Court has jurisdiction to try the said appeal. As against this, Shri R.S. Apte, learned Advocate for the Thane Municipal Corporation-original Plaintiff submitted that initially suit was for specific performance of the agreement and it was rightly filed in the court of Civil Judge Senior Division. Even the present Petitioner valued the appeal at Rs.40 lakhs. So, under such circumstances, the District Court, Thane had certainly no jurisdiction to try the said appeal and the same was rightly returned. He, therefore, submitted that the Writ Petition be dismissed.

11. From the pleadings of the parties and the evidence on record it is very clear that Thane Municipal Corporation was in occupation of area admeasuring 1950 sq.ft. in the old building initially owned by Thanawala and then by present petitioner. Admittedly, the said premises were occupied by Thane Municipal Corporation as tenant. It is in fact not in dispute that present Petitioner had written letters dated 30/10/1982 and 30/11/1982. It does appear that petitioner had agreed to provide equal accommodation to Thane Municipal Corporation in new building. If we peruse the plaint filed by Thane Municipal Corporation it is very clear that they had filed the said suit for specific performance of the agreement embodied in letters dated 30/10/1982 and 30/11/1982. It is true that in that suit they had also sought declaration that their tenancy has not come to an end but it is subsisting. However, the Plaintiff namely Thane Municipal Corporation had filed the said suit mainly for specific performance and in the alternative they had claimed damages of Rs.40 lakhs and valued the suit accordingly.

12. It is pertinent to note that in the Written Statement filed by the present petitioner in the said

suit, he had nowhere specifically contended that the Court of Civil Judge Senior Division, Thane had no jurisdiction in view of the provisions of section 28 of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as the Bombay Rent Act). Not only that but they had also not sought specific issue with regard to jurisdiction. From the judgement of the Trial Court, it is also clear that the said Court has also not considered the said suit as a suit under the Rent Act, as there was no issue with regard to jurisdiction, he did not record any finding with regard to jurisdiction.

13. It is needless to say that for the purpose of determining whether the ordinary Civil Court or Special Court constituted under section 28 of the Bombay Rent Act has jurisdiction to entertain a particular suit, the nature of suit has to be decided on the basis of the averments in the plaint and not on the basis of defence that may be taken up by the defendants. If we peruse the averments in the plaint and the relief claimed in the present case then apparently it does appear that though it was a suit filed by the tenant against the landlord for specific performance arising vis-a-visa tenanted premises it was a suit under the

Bombay Rent Act. For this, useful reference can be made to a case **Babubhai Narottamdas Kansara V/s. Venilal Dahyabhai 1975 All India Rent Control Journal 49**. So, prima facie it does appear that Plaintiff ought to have filed the said suit in the Special Court and as at Thane, there was no Small Cause Court it ought to have filed the suit in the Court of Civil Judge Junior Division in view of the provision of section-28 of the Bombay Rent Act. However, the fact remains that suit was filed not in the Court of Civil Judge Junior Division but it was filed in the Court of Civil Judge Senior Division. It is well settled that where there is Court of Civil Judge Junior Division and no Small Cause Court then the Court of Civil Judge Junior Division is a Special Court to try a suit under the Rent Act as per the provisions of Section 28 of the Bombay Rent Act. Court of Civil Judge Senior Division has certainly no jurisdiction to try a suit or proceeding under the Bombay Rent Act. But we find that in the instant case though the suit was filed in the Court of Civil Judge Senior Division by making valuation at Rs.40 lakhs, the same was not objected on the ground of jurisdiction and ultimately, suit is decreed by the said Court.

14. The main and the material question is which is

the proper Appellate Court in which such decree can be challenged. It is needless to say that if a decree is passed in Rent matter by the Court of Civil Judge Junior Division then it can be challenged in appeal before the District Court as per section 29 of the Bombay Rent Act. But, here the decree is not passed by the Court of Civil Judge Junior Division but is passed by the Court of Civil Judge Senior Division. Admittedly, the suit in question was not specifically transferred to the said Court by the District Court so as to confer jurisdiction to try the said suit filed under the Special Act as per the provisions of section 28 of the Bombay Rent Act. So, even if we assume that decree or order i.e. passed by the Court of Civil Judge Senior Division was without jurisdiction still then, while preferring an appeal against the said decree, we have to see what is the forum for appeal against the decree or order passed by the Court of Civil Judge Senior Division. So, in the instant case as the Special Civil Suit was valued at Rs.40 lakhs and the appeal preferred against the same by the present petitioner was also valued at Rs.40 lakhs, as per the provisions of Civil Courts Act it ought to have been filed in High Court. There the present petitioner could have agitated that the order passed by the Court of Civil Judge

Senior Division is illegal and without jurisdiction. The forum of appeal is not dependent on the nature of the plaint. It is dependent on the Court which has passed the impugned order. So, considering this aspect the learned Joint District Judge held that as pecuniary jurisdiction of the said Court was only upto two lakhs, the said Court had no jurisdiction to try the said appeal. He, therefore, rightly directed that the appeal memo be returned.

15. In view of the above, I do not find that there is any error of law in the order passed by the Joint District Judge, Thane. In this view of the matter, there is no substance in the present Writ Petition. Hence, the Writ Petition is rejected with costs.

(S.R.SATHE,J.)